No. 82-1627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE GREAT SOUTHWEST FIRE

INSURANCE COMPANY, PETITIONER

v.

CHARLES L. ISON, ET AL.,

RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner seeks another review of the judgment entered against it in the trial court on November 25, 1981, and affirmed by the United States Court of Appeals for the Sixth Circuit on January 28, 1983. That judgment, based upon an insurance contract, requires that petitioner satisfy judgments rendered against its insured, Parkway Processing, Inc. ("Parkway"), in the underlying case. The insurance issue was tried pursuant to a supplemental complaint filed under an Ohio law which permits a direct supplemental action against the insurer of a judgment debtor.

Petitioner, a casualty insurance company, issued a general liability insurance policy to Parkway Processing, Inc. on June 3, 1977.[1] Petitioner's policy declared that Parkway was insured against hazards arising from the operation of a coal dock on the Ohio River near Ironton, Ohio.[2] On June 5, 1977, just two days after petitioner's policy was issued, a pleasure craft proceeding downstream on the Ohio River collided with a steel conveyor belt boom extending out over the water from a work barge apparatus being used as a dock. Respondents are the owner/operator and passengers on that pleasure craft who were injured in the collision.

[1]Petitioner's policy is not reproduced in the Appendix due to its size and bulk. The relevant language, cited by both the trial court and the court of appeals, is set forth in footnotes 2 and 3 below.

[2]The declarations page lists, among the risks insured, "44594-Coal dock operation by means of mechanical apparatus . . . . "

Petitioner defended its denial of coverage on the basis of a standard "watercraft" exclusion in its policy.[3]

Both the trial court and the court of appeals ruled in favor of coverage for two basic reasons: (1) The policy declared coverage for a coal docking facility of which the work barge and conveyor belt boom were an integral part; and (2), the watercraft exclusion was not applicable because the barge had been pulled partially on the bank and was therefore a "watercraft . . . ashore" under the policy.

[3]The exclusions page states that coverage shall not apply: "(e) to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of

(1) any watercraft owned or operated by or rented or loaned to any insured, or

(2) any other watercraft operated by any person in the course of his employment by any insured;

but this exclusion does not apply to watercraft while ashore on premises owned by, rented to or controlled by the named insured;"

SUMMARY OF ARGUMENT

The petition does not raise an important or substantial question for review. The trial court and the court of appeals, based upon factual considerations, correctly determined that petitioner's insurance policy declared coverage for the type of damages sustained by respondents and that such coverage was not excluded under a standard form "watercraft" exclusion.

ARGUMENT

This Court should not issue a writ of certiorari. The judgment against petitioner is based upon factual findings and does not involve any substantial question of law that merits this Court's attention. Contrary to petitioner's assertions, the decision has no impact on casualty insurance policies generally, and is certainly not contrary to logic and law.

Petitioner issued an insurance policy covering a "coal dock operation" conducted by its insured at a river dock located on the Ohio River near Ironton, Ohio. The work barge apparatus, which petitioner claims is an excluded "watercraft," was an old work barge which "was moored at the shore as a part of the coal-docking facility." (District Court's Memorandum and Order of November 25, 1981, Petitioner's Appendix, p. 13.) The boom with which the pleasure craft collided was an attachment to the work barge which supported a conveyor belt mechanism designed to carry the coal. As the trial court noted, Parkway's owners described the entire apparatus as the "coal-docking facility." (Petitioner's Appendix, p. 13.) Without the work barge, there was no "coal dock operation."

The trial court also found that "[a]t the time of the collision the barge was partially sunken and partially ashore." (District Court's Opinion of February 4, 1981, Petitioner's Appendix, p. 36.)

Petitioner maintains that the trial court and the court of appeals in effect ruled that the work barge was at the same time both a watercraft and not a watercraft. This argument is disingenuous at best.

In the underlying case, petitioner's insured conceded admiralty jurisdiction and the trial court found liability on the basis that the work barge, a "vessel" or "watercraft" as those terms are used in admiralty, did not have the required lighting. But when the same court was asked to construe the petitioner's insurance policy, it faced a completely different question in a separate area of the law.

The trial court concluded, based upon the particular declarations and exclusions in petitioner's policy, that:

> (1) "It is beyond doubt that the barge was part of the 'coal dock operation' designated by the parties as a risk that was intended to be insured."
>
> (2) "[T]he barge was not intended . . . for use as a transportation vessel . . . and . . . was in fact incapable of such use at the time of the accident."
>
> (3) The exclusion does not apply by its own terms because the work barge was partially ashore.
>
> (Petitioner's Appendix , pp. 13 and 14.)

As the trial court also noted,

> "If [petitioner's] arguments were considered in a vacuum, isolated from the facts of this case and the context of the entire insurance policy, it would merit serious consideration. But we are unable and unwilling to ignore findings that we have already made in this case."

The simple fact of the matter is that petitioner's own insurance policy is the source of its problem. In plain English, petitioner declared that it was insuring a coal dock operation which its insured's owners testified included the boom and the conveyor belt apparatus located on the work barge. In the words of the court of appeals:

> "The policy, by the terms of its declaration, was intended to cover risks arising from the operation of a coal-docking facility, and this work barge and conveyor were an integral part of such facility."

If one was unsure about the language of the declarations page, the petitioner would still be faced with declarations that conflict with the standard form "watercraft" exclusion, thus creating an ambiguity which must be construed against it. *American Ins. Co. v. L. H. Sowles Co.*, 628 F.2d 967, 969 (6th Cir. 1980); *Union Investment Co. v. Fidelity and Deposit Co. of*

Maryland, 549 F.2d 1107, 1111 (6th Cir. 1977); *Royal China, Inc. v. Travelers Indemnity, Inc.,* 497 F.2d 989, 992 (6th Cir. 1974); *Simpson v. Jefferson Standard Life Ins. Co.,* 465 F. 2d 1320, 1325 (6th Cir. 1972). Under Ohio law, the rule of liberal construction in favor of the insured and strict construction against the insurer applies with particular force when exclusionary language is involved. *American Financial Corp. v. Fireman's Fund Ins. Co.,* 15 Ohio St.2d 171, 239 N.E.2d 33 (1968); *Cincinnati Ins. Co. v. Mosley,* 41 Ohio App. 2d 113, 322 N.E. 2d 693 (Brown Co. 1974).

It is also an elemental proposition of insurance law that specific policy language, such as that used in the declarations of coverage in the instant case, controls over general standard provisions. *INA v. Wells,* 35 Ohio App. 2d 173, 300 N.E.2d 460 (Franklin Co. 1973); *David v. Texas Life Ins. Co.,* 426 S.W.2d 260 (Tex. Civ. App. 1968) (where general and specific clauses related to same thing the specific will control); *Trujillo v. State Mut. L. Assur. Co. of Worchester, Mass,* 511 P.2d 534 (Colo. App. 1973) (specific provisions control general and insurance contract may not be construed in disregard of express provisions).

Both the trial court and the court of appeals also concluded that even if petitioner overcame the express declarations of coverage and the ambiguity questions, the exclusion did not apply by its own terms. The exclusion states that it "does not apply to watercraft while ashore on premises owned by, rented to or controlled by the named insured." Since the trial court found that the barge was partially ashore at the time of the collision, it is clear that the exclusion could not apply.

CONCLUSION

Rule 17 of the Supreme Court Rules states that there must be special and important reasons presented before this Court will agree to grant review on certiorari. In the instant matter, the issue presented by petitioner is neither special nor important.

The decision of the court of appeals to affirm the judgment against petitioner was based upon factual considerations. No important issue of law is presented, and petitioner's argument that all insurance policies are endangered by the judgment in this case is totally without merit.

Plaintiffs-Respondents Charles L. Ison, Daniel C. Ott and Denver Roof respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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